General Trailer, Inc. *and* International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO

General Trailer, Inc. *and* International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO, Petitioner. Cases 32–CA–16935 and 32–RC–4486

March 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On June 17, 1999, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order[3] as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, General Trailer, Inc., Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging, laying off, closely monitoring, stating that overtime was being denied, denying overtime, or otherwise discriminating against any employee for supporting International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO, or any other union, or for complaining to the local Air Pollution Control Board."

2. Substitute the following for paragraph 1(b).

"(b) Stationing armed guards at the facility in front of a locked front gate on election day, thereby preventing unit members from voting."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I do not necessarily agree that the discharge of Piper was unlawful.

My colleagues find the violation because, they say, Donald Piper was treated differently from others who committed the same offense. In response, I recognize that Piper and others were responsible for poor work on a certain job. However, Piper was also responsible for poor work on another job a few weeks previously. There is a conflict in the evidence as to whether Respondent

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent laid off and discharged Richard Marshall because he engaged in union activity. However, we find it unnecessary to rely on the small plant doctrine, as did the judge, to establish that the Respondent knew of Marshall's union activity before the layoff and discharge. We note that the judge credited employee Terry Thomas' testimony that the Respondent's agent, Philip Gollihar, said Marshall had been laid off because he was a ringleader of the union organizing drive. Accordingly, there is direct evidence of the Respondent's knowledge of Marshall's union activity.

As the judge found, Donald Piper was treated differently regarding the poor work done repairing a trailer in that he was the only employee who worked on the project or supervised the work who was punished. Our dissenting colleague points to the Respondent's alleged reliance on the poor work done by Piper on an earlier job to support its decision to terminate Piper. He states that absent a credibility resolution favorable to the General Counsel he would find for the Respondent. The judge, however, fully discusses the earlier incident and the fact that Piper received a 2-day suspension without pay for his unsatisfactory work. While the earlier deficiency might have explained why Piper could have received a more severe level of punishment, if punishment is to be awarded, it does not explain why Piper was disparately treated in that only he was punished.

[3] In his recommended Order, the judge recommended that the Charging Party Union's objections to the election in Case 32–RC–4486 be sustained and the election be set aside. There are no exceptions to this portion of the judge's Order. We accordingly adopt the judge's Order in this respect.

[4] The General Counsel's limited cross-exceptions noted certain inadvertent errors where the judge's Order and notice failed to conform to the judge's findings. We correct these minor inadvertent omissions.

The Charging Party has requested that the Board grant extraordinary remedies in addition to a *Gissel* bargaining order. We find that no other extraordinary remedies are warranted in the circumstances of this case.

Member Brame agrees that a bargaining order is appropriate in the particular circumstances of this case. In Member Brame's view, any bargaining order must be closely reviewed because it necessarily denies employees the opportunity to vote in a secret-ballot election after hearing the positions of the employer and the union concerning representation. In adopting the judge's recommendation that a bargaining order is warranted in this case, Member Brame relies particularly on the Respondent's stationing of armed guards and locking its gate on election day, and thereafter preventing the discharged employees whose terminations are the subject of this case from voting challenged ballots. In his view, this conduct seriously compromised and communicated to the voters the Respondent's disdain for the Board's election process. Cf. *U.S.A. Polymer Corp*., 328 NLRB 1242 (1999) (bargaining order based in part on the employer's asking employees if they had received subpoenas to testify in the unfair labor practice hearing and advising them to ignore the subpoenas), and *New Life Bakery*, 301 NLRB 421 (1991), enfd. 980 F.2d 738 (9th Cir. 1992) (bargaining order based in part on the employer's threatening employees if they complied with Board subpoenas). Member Brame additionally notes the Respondent's limited exceptions to the recommended bargaining order.

relied on both incidents when it fired Piper. Piper testified the Respondent's agent (Fernandes) made reference only to the one work deficiency. Fernandes testified that he made reference to both work deficiencies. Although the judge discussed the earlier incident, he failed to resolve this critical conflict. That is, if Fernandez is credited, Piper was cited for two deficiencies. Since Piper was unlike the others in this respect, there would be no disparity of treatment. Accordingly, absent a credibility resolution favorable to the General Counsel, I would not find this violation.

Notwithstanding the above, I agree with my colleagues that a *Gissel* order is warranted, based on the other violations.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, lay off, closely monitor, state that overtime was being denied, deny overtime, or otherwise discriminate against any of you for supporting International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO, or any other union, or for complaining to the local Air Pollution Control Board.

WE WILL NOT state that certain employees had been laid off because they were ringleaders of the Union; that a foreman had been instructed to get rid of an employee because he was a leader of the Union; and thereafter that we would close our facility rather than let the Union come in.

WE WILL NOT blame the Union for refusing to give an employee a pay raise.

WE WILL NOT closely monitor our employees nor tell them they are being denied overtime opportunities in retaliation for supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargaining with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time trailer mechanics, repair persons, welders, painters, parts employees and delivery drivers employed by the Employer at its Stockton, California facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Marshall and Donald Piper full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard Marshall, Donald Piper, Donald Jessee, and Terry Thomas whole for any loss of earnings and other benefits resulting from their discharges or other discrimination as applicable, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Richard Marshall, Donald Piper, the unlawful layoff of Donald Jessee and the apparent unlawful denial of overtime opportunities of Terry Thomas, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

GENERAL TRAILER, INC.

Jeffrey L. Henze, Esq., for the General Counsel.
N. Paul Shanley, Esq., of Sacramento, California, for the Respondent.
David A. Rosenfeld, Esq., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Stockton, California, on February 8, 9 and 10, 1999,[1] pursuant to a third amended complaint issued by the Regional Director for the National Labor Relations Board for Region 32 on December 21. In addition, on November 12, the Regional Director ordered consolidated certain issues arising from a representation election in Case 32–RC–4486. The third amended complaint, based on charges filed on August 13 and on January 5, 1999 (first amended charge), by International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO (the Union), alleged that General Trailers, Inc. (Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

[1] All dates refer to 1998 unless otherwise indicated.

The Union's representation petition was filed on July 14 and sought a representation election among certain of Respondent's shop employees. An election was held pursuant to a Stipulated Election Agreement on August 20. Objections to conduct affecting the outcome of the election were filed by the Union on August 25.

The tally of ballots served on the parties at the conclusion of the election showed that of approximately 13 eligible voters, 6 cast ballots for, and 7 against the Petitioner. There were no void or challenged ballots. Thereafter, Petitioner filed certain timely objections to the election (GC Exh. 1(h)). The Union having offered no evidence at the instant hearing in support of the objections, they will be considered only to the extent they track any unfair labor practices found.

Issues

1. Whether employee Philip Gollihar is an agent of Respondent.

2. Whether Respondent terminated three bargaining unit employees Richard Marshall, Donald Piper, and Stacy Slaton because the employees joined or assisted the Union or engaged in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

3. Whether at an employee safety meeting held prior to the election, Respondent solicited employee grievances and impliedly promised to remedy them and did remedy them.

4. Whether Respondent used armed guards stationed at its closed gate on election day to deter one or more unit employees from voting, where said employees would otherwise have been entitled to cast a ballot.

5. Whether Respondent, acting through its supervisors and/or agents interfered with, restrained, and coerced unit employees by making one or more statements placed in issue by the third amended complaint.

6. If one or more violations of the Act are found, whether a bargaining order is the appropriate remedy.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine, and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.[2]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The Respondent admits that it is a California corporation engaged in the manufacture, repair, and maintenance of trailers and having a facility located in Stockton, California. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods valued in excess of $50,000 directly form suppliers located outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[2] On April 1, 1999, the Union filed a document styled, "Joinder" by which it joined in the arguments made by counsel for the General Counsel.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Association of Machinists and Aerospace Workers, Machinists Automotive Trades District Lodge 190, Local Lodge 2182, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

On or about May 10, 1997, Al Fernandes, Respondent's owner and president, took over a preexisting business which had engaged in the same work as Respondent now performs. Fernandes assumed control with the assistance of two investors, his father-in-law and his wife's uncle. Neither investor has to date earned a return on his investment and neither played any role in this case. Some employees were retained by Fernandes when he took over.

Both Fernandes and his Service Manager Terrance Mellinger, testified for Respondent. They are assisted in managing the business by Philip Gollihar, shop foreman, and another Respondent witness. Gollihar worked for a time under the prior owner and was retained by Fernandes. Under normal conditions, Gollihar assigns and supervises work, including assignment of overtime, explains how the work is to be performed and answers questions about the work. When an assignment is finished, employees report back to Gollihar. Gollihar's position description "Shop Foreman" was admitted into evidence (GC Exh. 2). In addition, Gollihar takes calls from employees who cannot report to work for illness or other reasons and performs a limited disciplinary function. For monthly safety meetings, Gollihar sets the agenda, conducts the meetings, and keeps minutes of the meetings. He has a minimal degree of interaction with customers. About 20–25 percent of his time is spent "working with the tools" performing the same work as other mechanics. Gollihar is the highest paid employee who works with the tools, making $1 per hour more than the next highest paid employee.

The General Counsel does not contend that Gollihar is a statutory supervisor; instead, the General Counsel contends he is an agent of Respondent's, an issue to be decided below. For now, it suffices to say that during the union campaign which is yet to be described, Gollihar attended at least one union meeting and actively participated in the meeting without objection by anyone. On election day, August 20, he voted without challenge.

2. Union campaign

A few days before one or more employees contacted the Union, a group led by alleged discriminatee Richard Marshall asked Gollihar to intercede with Fernandes to obtain pay raises. While there is conflict about the exact way Fernandes responded, all agree that the raise was turned down. This refusal to increase pay, a general perception that employees had fewer benefits under Fernandes than before, and an apparent increase in paint work in the shop without adequate ventilation, or other protection, convinced some employees that a union would help to resolve various grievances. Marshall, an employee since August 1996 and Donald Gary Jessee, a foreman under prior management between 1980–1983, and Respondent employee

since September 1997 took the lead in contacting the Union and arranging the first meeting with union representation.

On July 10, the General Counsel witness and union organizer Joe Coy hosted the first union meeting at 5 p.m. at the union hall. Eight employees showed up and after discussion, signed a petition which contains the heading,

Yes, We Want the IAM

> We believe that only through collective bargaining can we have a voice in our work, achieve fair treatment for all, establish seniority and better benefits, wages and working conditions. Therefore this will authorize the [IAM] to represent me in collective bargaining with my employer. This will also authorize said union to use my name for the purpose of organizing. General Tire Service of Stockton.

The signers were Jessee, John Camara, Marshall, Terry Thomas, Joseph Munoz, Stacey Slaton, Carlos Montes, and Guy Harris [GC Exh. 14]. Jesse, Marshall, Thomas, and Slaton testified for the General Counsel. The meeting concluded before all interested employees could attend due to their having to work overtime. Accordingly, a second page of the same petition described above was left outside the locked union hall. About 6 or 6:30 p.m., three additional Respondent employees, Donald Piper, Brett Fields, and Michael Frank arrived and also signed [GC Exh. 15]. Of this group, only Piper, an alleged discriminatee, testified for the General Counsel. Piper then slipped this petition under the door of the union hall. Without objection, an agreed-on list of employees contained in the bargaining unit described at par. 9 of the complaint was admitted into evidence [GC Exh. 16]. The total of the bargaining unit employees is 16 which indicates that the 11 petition signers referred to above constitutes a majority of the bargaining unit desired the Union as of July10.

On July 14, Coy and his superior, James Beno, the Union's area director, personally delivered a letter to Respondent in the afternoon. This letter reads as follows:

> July 14, 1998
>
> Mr. Al Fernandes
> GENERAL TRAILER SERVICE OF STOCKTON
> 3931 N. Wilson Way
> Stockton, CA 95202
>
> Dear Mr. Fernandes:
>
> Please be advised that I.A.M. & A.W. Machinists and Mechanics Lodge No. 2182, District Lodge No. 190 of Northern California, represents the majority of your employees who perform work as mechanics, welders, fabricators, painters and delivery drivers.
>
> If necessary, we are prepared to agree to an independent impartial third party check of the authorization petition from your employees to prove our majority status. We are requesting immediate negotiations to consummate a collective bargaining agreement for and on behalf of the employees we represent covering wages, benefits, hours and working conditions.
>
> In accordance with Federal law, we are requesting that you maintain a "status quo" environment within the affected employees. Absolutely no reprisals may be taken against them, nor may you or any representatives of your company threaten, coerce or interrogate any employees or interfere with their Union activities.
>
> Please respond immediately to this communication.
>
> Sincerely,
>
> /s/ James H. Beno
>
> James H. Beno
> Area Director, District Lodge
> 190/LL 2182/1528/801
> [G.C. Exh. 10.]

Fernandes was not in at the time of delivery and the union representatives spoke to Mellinger who stated he would convey the letter to Fernandes. Respondent declined to extend voluntary recognition to the Union and at the subsequent election of August 20, as noted above, the Union lost by a single vote.

Before the Union delivered its letter and after, a series of events happened which constitutes the heart of this case. In addition, it is alleged Gollihar made a series of statements incriminating to Respondent, and according to the General Counsel, imputable to Respondent.

B. Analysis and Conclusions

1. A note on witness credibility

It is part of the judge's job to ascertain the credibility of witnesses. Seldom, if ever, do all witnesses agree with one another on material points. However, seldom if ever, has a case presented itself where so many witnesses mutilate the truth and demonstrate little regard for the oath. As will be made clear below, I will disbelieve much of the testimony provided by Respondent's witnesses. I will also discredit one of the General Counsel's alleged discriminatees. The volume of untruths in this case must be noted for the record and deplored by all concerned.

2. The three alleged discriminatees

a. Applicable legal principles

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities." *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

In this case, I find that the General Counsel has established a strong prima facie case of discrimination against Richard Marshall, Donald Jessee, and Donald Piper because of their union or other protected activities.

b. Richard Marshall/Donald Jessee

Marshall, a primary union organizer who had worked for Respondent and its predecessor for about 2 years as a mechanic, welder, and fabricator was abruptly called into the front office about 11:30 a.m. on July 15, the day after Coy and Beno had delivered the demand letter. Fernandes told Marshall that it had been slow the last couple of months so he was being laid off and that he would be brought back as soon as work picked up. Marshall was paid for the remainder of the day and shortly thereafter left the building.

First, as to the timing, I find the layoff is stunningly obvious. *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (2d Cir. 1972). See also *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984), on timing factor and on similar facts to instant case. It is undisputed that Fernandes knew that someone had brought in the Union, witness the Union's demand letter, but I also find that Fernandes had knowledge of Marshall's specific role as an in-house organizer.

The Board and courts have recognized the "small plant doctrine," as a vehicle for finding from circumstantial evidence that an employer knew about union activity and its participants earlier than acknowledged. See *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981), and *Avecor Inc.*, 931 F.2d 924, 929 (D.C. Cir. 1991). Thus, I note it was common for Respondent's small complement of shop employees to discuss matters not directly related to their work and such matters frequently became known to Fernandes. For example, after his layoff, Marshall called the local Air Pollution Control Board about Respondent's paint fumes. I will cover this in more detail below, but for now it is important that Respondent suspected that Marshall had done so as he had said something to one of the guys in the shop and it got back to Mellinger (Tr. 437). Also Fernandes had heard Marshall was painting motorcycles at home and his questioning of Marshall about this activity led to a confrontation at the shop on July 21, to be described below. After Marshall's subsequent termination, Fernandes allegedly heard rumors that he was going to come to the facility on August 20 and attempt to vote (Tr. 545).

I also credit Donald Piper, an alleged discriminatee, who testified for the General Counsel, that on the day of the July 10 union meeting, he asked Gollihar for permission to work through lunch so he could leave early and do some personal errands and attend a union meeting where he had to sign a paper. I will find below that it is reasonable to assume that Gollihar conveyed this information to Fernandes and Marshall.

The other person abruptly laid off on the same day as Marshall was general witness Donald Jessee, a current Respondent employee. Both men were considered the highest paid and most skilled employees. Both men, along with current employees, Terry Thomas and alleged discriminatee Piper, testified there was ample work to be done. It is undisputed that although there are frequent slow periods such as Thanksgiving and Christmas seasons and occasionally during the summer, Respondent, at least during Fernandes' ownership, has never experienced a layoff before. I decline Respondent's invitation to wade through documents created by Mellinger for this litigation purporting to show Respondent's decline in business (R. Exhs. 19–21). The evidence of pretext presented by the General Counsel is so convincing, I am not reluctant to dismiss Respondent's claim of slow business as a motivator for the layoffs as incredible and fantastic.

Consider, both men were paid for the entire day (Wednesday) though they were laid off before noon; both men were in the middle of their work assignments, with additional work in the yard waiting. I find that as a result of the unnecessary and pretextual layoffs, Gollihar had to increase his time working with the tools (whether he put on his coveralls or not is of little moment). Jessee, in particular, got in a heated argument with Mellinger on being told of his layoff and harsh and obscene language was used by both men. But on the following Monday, July 20, Respondent called Jessee back to work and offered to reinstate him immediately. However, Jessee had already been paid for an earned vacation when he was laid off and asked if he could start back the following Monday, so he could take his vacation. Mellinger agreed to this and Jessee lost only 2 days of work. In his testimony, Mellinger explained that he called Jessee back to work because he had received a commitment "from a customer to build some racks for some trailers, some stands" (Tr. 407). No details were provided and I don't believe Mellinger's explanation. Jessee was brought back because Respondent had made its point regarding what happens to people who want the Union. Any confusion in the minds of employees would be resolved on learning the fate of Marshall on July 21. The facts in the instant case thus far are strikingly similar to those in *American Chain Link Fence Co.*, supra, 255 NLRB at 692–693.

Like Jessee, Marshall too came to the facility on July 20, but his experience was different. Before relating the events of that day, I note that as a result of Marshall's complaint to the Air Pollution Control Board, an agent of that agency named Diane Busalacchi visited Respondent's facility on July 15, in late afternoon. Busalacchi testified for the General Counsel that although her visit was unannounced beforehand, upon explaining her purpose to Fernandes and Mellinger, one of the two responded, "We've been expecting you. We just let a person go and we knew you'd be coming through." The witness prepared a complaint investigation report (GC Exh. 17) and upon a tour of the facility found certain irregularities which are not important here. She ultimately prepared a notice to comply (GC Exh. 18) for Respondent to correct its deficiencies, but no citation or penalty was ever issued.

To return to Monday, July 20, Marshall came to the facility to pick up certain paychecks for money due and owing. Fernandes asked Marshall if he was painting motorcycles at his home, but Marshall refused to answer saying what he did on his

own time was his business. Fernandes repeated the question another time, but received the same response. As to Marshall's paychecks, Fernandes withheld one of the three checks due Marshall until Marshall turned in his uniforms.

The following day about 2:30 p.m., Marshall returned with his uniforms and asked for his missing check and certain forms relating to the type of paint used in the shop. Fernandes returned with copies of the requested forms and with Marshall's remaining paycheck, but before Fernandes turned them over to Marshall, a near violent confrontation ensued. The details of this event are sharply disputed.

According to Marshall, Fernandes waved his paycheck in the air and continued to query Marshall about painting motorcycles at home. As Marshall refused to answer and demanded his paycheck, Fernandes again waved his paycheck up in the air and near the counter. In attempt to further provoke Marshall, Fernandes demanded to go "man to man" with Marshall. Finally, Marshall forced Fernandes' hand down on the counter separating the two men and managed to grab his paycheck from Fernandes' hand. Before leaving, Marshall said to him, words to the effect, "I could kick your ass."

Marshall was supported in his version of events by Terry Thomas, a current employee of Respondent's who testified for the General Counsel. Like Marshall, Thomas was a mechanic and had worked at the facility for about 4 years. Thomas had been summoned by Marshall to the front showroom area where all agree the confrontation occurred to witness what Marshall apparently suspected might be a hotly disputed meeting. Thomas never heard Marshall threaten to kill Fernandes nor utter an implied threat regarding, "watch your worker's compensation costs go through the roof."

Thomas claimed to be watching the incident from a doorway into Respondent's public showroom area. None of Respondent's witnesses confirmed that Thomas was present. I note that Marshall and Thomas were members of the same motorcycle club and were apparent close friends outside of work.

Needless to say, Respondent's witnesses provide a substantially different version of events. Fernandes testified that as he was about to give Marshall his paycheck and the requested documents, he did ask Marshall about painting motorcycles at his house just as he had done the day before (Tr. 584). Fernandes admitted at hearing that he really didn't care if Marshall was painting motorcycles at his home; rather, Fernandes believed that Marshall had called the Air Pollution Control Board and in part, Fernandes wished to send Marshall a sarcastic message that Marshall could inhale paint fumes at his home, painting motorcycles, but then report Respondent for paint fumes at work (Tr. 549). Fernandes denied knowing for sure that Marshall had made the air pollution complaint, but allegedly suspected that any adverse reaction to paint fumes occurred at Marshall's home. I don't believe Fernandes on this point and, based on the testimony of Busalacchi, I find that Fernandes had a strong suspicion that it had been Marshall who called the Air Pollution Control Board.

In any event, according to Fernandes, once he asked Marshall about painting motorcycles at home, Marshall slammed Fernandes' hand down on the counter and threatened to kick his ass, to kill him, and to somehow, increase Respondent's workman's compensation costs. To support Fernandes, Respondent called Mellinger, Linda Welk, Respondent's office manager, and, two of Respondent's current employees in counter sales, Richard Good and John Nance. All corroborated Fernandes in all or most important details of this incident.

After Marshall left with his paycheck and papers, Fernandes called the local sheriff's office and a deputy named Richard Cordova responded. The General Counsel called him as a witness and like Busalacchi, he was very credible since neither of these two witnesses were identified with a party nor had they any reason to fabricate. Cordova was dispatched on a non-emergency basis to Respondent's facility on the day in question. On arrival, Cordova was told by Fernandes that he had been subject to verbal abuse including threats by Marshall to beat Fernandes up. No threats to kill had been reported to Cordova. Before Cordova left, Fernandes asked him not to arrest or even to contact Marshall, because he hung out with an undesirable crowd and Cordova did not do so.

Based on the alleged events of July 21, Marshall was fired by Respondent. I credit the accounts of the two independent witnesses, Busalacchi and Cordova, and Respondent's current employee, Thomas, who is entitled to enhanced credibility by virtue of his status as a current employee. *K-Mart Corp.*, 268 NLRB 246, 250 (1983). I find that Fernandes intended to fire Marshall when he was laid off, just as he or Mellinger told Busalacchi. This shifting account of when Marshall was fired and on what grounds is strongly suggestive of pretextual reasons for discharge. Cf. *Atlantic Limousine*, 316 NLRB 822, 823 (1995); *U.S. Service Industries*, 324 NLRB 834, 837 (1997).

I also find that Marshall's complaint to the Air Pollution Board was protected by the "mutual aid or protection" clause of Section 7 of the Act. The evidence shows that several employees besides Marshall were concerned about the respiratory problems cause by paint fumes in the shop, e.g., Slaton and Jessee. See *Squier Distributing Co. v. Teamsters Local 7*, 801 F.2d 238 (6th Cir. 1986), and cases cited at 241. See also *Martin Marietta Corp.*, 293 NLRB 719 (1989), and *Systems with Reliability,* 322 NLRB 757, 760 (1996) (complaint to OSHA over air pollution held protected). The mere fact that Marshall did not make his complaint to the Air Pollution Control Board until after he was laid off does not, in my judgment, remove his complaint from the protection of Section 7 of the Act.[3] While he may have questioned if and when he would be reinstated–not knowing that Respondent never intended to reinstate him–find that he was still motivated to improve working conditions for himself and other employees who were still working in the fumes from the painting. It is clear to me that in this case "mixed motive" means "dual motive"; that Marshall was terminated both because he was perceived as a leader of those who wanted the Union and because he complained to the Air Pollution Control Board. To the extent that Marshall may have acted inappropriately in his behavior of July 21, I find he was intentionally and deliberately provoked by Fernandes. See *Indian Hills Care Center*, 321 NLRB 144, 151–152 (1996), and *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993).

In light of the above, I find that Respondent violated Section 8(a)(1) and (3) of the Act by laying off Marshall and Jessee and by terminating Marshall. That is, Respondent has failed to rebut the strong prima facie case established under *Wright Line*

[3] I note that the motive of an employee who takes an action related to working conditions is irrelevant in determining whether the action is protected. *NLRB v. Parr Lance Ambulance*, 723 F.2d 575, 578 (7th Cir. 1983). See also *Mike Yurosek & Son, Inc.*, 310 NLRB 831, 832 (1993).

to show that Marshall and Jessee would have been laid off and Marshall subsequently terminated absent their protected activities. *Louis A. Weiss Memorial Hospital*, 324 NLRB 946, 957–958 (1997).

c. Donald Piper

As already recited, Piper was a union supporter and known by Respondent to be such. He was allegedly terminated for poor work and attendance problems, but based on the evidence presented, I find that the reasons given were pretextual. Piper was hired in November 1997 as a helper, a classification he retained up to his termination on July 13. The classification of "helper" represented a lower degree of skill than "mechanic" and Piper was paid accordingly ($10 per hour compared to $13 to $14 per hour). Based on his testimony, I found Piper to be something of a "free spirit" given to dramatic flourishes and overstatement. However, the conclusions flowing from the facts and circumstances surrounding his case cannot be denied.

Sometime in June, Piper had been given an assignment to repair a trailer owned by Gilley, a customer which Respondent had long pursued. According to Fernandes, the work was unsatisfactory and had to be redone, costing Respondent money. In fact, as a result of the poor work and a subsequent argument between Piper and Mellinger as to whether Piper was responsible for poor work, Piper was suspended without pay for 2 days. Then about a week before his termination, Piper was assigned a second Gilley trailer to repair, this one requiring much more skill to do a good job as the entire floor of the trailer had to be replaced. To assist Piper, Gollihar assigned his 16 year old son, "P.J.," a high school summer employee working as a "clean-up boy," who did not testify. Piper and P.J. worked on the trailer over several days, during which time Gollihar either made periodic inspections finding the work satisfactory, or contrary to his job responsibilities, did not periodically inspect the work. In any event, the work on the second trailer was completed on a Friday evening. According to Piper, Gollihar was not present when the trailer was released, but Mellinger looked the job over and felt the job would pass muster. According to Gollihar, he was present, inspected Piper's work, knew it fell short, but released the trailer anyway, hoping that Gilley wouldn't notice the deficiencies. Another predelivery inspection was supposed to have been performed by Guy Harris, the driver of the tractor hauling the trailer back to Gilley's. Like P.J., Harris didn't testify.

Respondent presented several photographs of Piper's and P.J.'s work and even to the lay person, the deficiencies appear obvious (R. Exhs. 18(a)–(i)). The problems include bolts not fastened properly, floorboards not spaced properly allowing gaps on the floor, and the floorboard not flush against each other creating an uneven surface. Predictably, Gilley called Respondent on receipt of his trailer and complained. The following Monday the trailer was returned to Respondent's shop for reworking at Respondent's expenses. For this fiasco, only union supporter Piper was punished, while Gollihar was "talked to" about his failure to properly supervise the ongoing work and his even more egregious decision to release the trailer without an effective final inspection. As to P.J. and Harris, nothing at all apparently happened to them.

On cross-examination of Piper, Respondent's counsel referred to several documents allegedly showing Piper's history of questionable work and other maladjustments (R. Exhs. 5–11). Some of these documents, such as warning letters, were not signed by Piper and he denied ever seeing them before. Other documents such as evaluations which Piper also denied ever seeing before, showed that Piper's shortcoming became critical only when he expressed support for the Union. As to whether Piper falsified any representations on his application for employment—Gollihar checked the application out initially—I decline to express any opinion on that point, because even if he did, it is clear that Respondent was not aware of alleged misrepresentations until it was time to prepare for hearing. Therefore, the alleged misrepresentations, constitute after–discovered evidence and played no role in Piper's termination. See *Fixtures Mfg. Corp.*, 251 NLRB 778 (1980). Piper's stated reason to the California Employment Development Department (CEDD) in his application for unemployment benefits (July 15) (R. Exh. 11) that he was "fired because they need to fire somebody so people could get raises," does not impeach the evidence gathered and presented by the General Counsel, to show Piper was fired because he supported the Union.

The essence of discrimination in violation of Section 8(a)(3) of the Act is treating like cases different. *Restaurant Corp. of America*, 827 F.2d 799, 807–808 (D.C. Cir. 1987). I find that the General Counsel established a strong prima facie case under *Wright Line* based on disparate treatment. That is neither Gollihar, P.J. nor Harris were disciplined for the poor work on the Gilley trailer. See *American Wire Products,* 313 NLRB 989, 994 (1994) (absent a reasonable explanation, disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination). I find that Respondent has failed to rebut the prima facie case to show that Piper would have been fired absent his union activities. Accordingly, Respondent violated Section 8(a)(1) and (3) of the Act by terminating Piper.[4]

d. Stacey Slaton

Slaton worked for Respondent as a trailer mechanic between May 1997 and March 1998 when he quit. He then returned to Respondent in June and as I will find below, quit again on or about August 10. I found Slaton, on the whole, to be a noncredible witness and I stopped believing most of his testimony shortly after he gave his name. For example, Slaton described a lunch gathering on July 15, at work with several coworkers including Thomas, Carlos Montes, Joe Munoz, and others. The subject of discussion was the layoffs of Marshall and Jessee. To protest the layoffs, Slaton proposed a "sick-out," i.e., a concerted claim by employees that they could not work due to illness, when they really were not ill. Other employees expressed little or no support for the idea so Slaton abandoned it. Then after lunch, Slaton reported to Gollihar that he was too ill to work so he proposed to go home sick. Before he left, Mellinger asked to see him. When Slaton reported his alleged symptoms, upset stomach supposedly caused by something he ate at lunch, Mellinger asked him if he knew what he was doing. Mellinger added if he desired to return to work the next

[4] Two final points as to Piper; first, in light of my analysis above, I need not determine whether Piper was "set up" to fail by assigning him work so clearly beyond his capabilities that the end result was preordained. Second, sometime in August, Piper was seen by his own physician regarding a work injury of his arm. According to Piper, the physician advised him he could not work for the Respondent at all (Tr. 294). I agree with the General Counsel that Piper's physical condition may present an issue at the compliance stage, but for now, I will recommend that Piper be made whole for the discrimination against him.

day, he should bring in a doctor's note, an apparent change in the prior practice of requiring a doctor's note only after 3 days off sick.

Slaton and Gollihar had worked together at a prior job before Respondent. In fact, the two men lived close to each other on the same street. Gollihar allowed somewhat inconsistently that while Slaton wasn't his friend, he liked the guy; Slaton was all right (Tr. 629).

On Monday, August 10, Slaton was scheduled to work but he testified at hearing that an upset stomach prevented him from working. He testified that he called Gollihar to explain the problem, but Gollihar denied receiving any such call and I credit Gollihar on this point, as there is no record of any such call being made. Moreover, subsequent events show beyond a reasonable doubt that Slaton's account was a complete fabrication.

Slaton claimed he was so ill he went to a local hospital emergency room with a friend named Diane Butler, with whom he has a current relationship. After allegedly waiting an hour, he began to feel better so he left without seeing anyone. Neither Butler nor any hospital documents were presented as evidence to corroborate Slaton. I don't believe a work of this testimony.

After leaving the hospital, Slaton and Butler went to a local Home Depot store to buy some things and who should be there making his own purchases, but Fernandes. Fernandes happened to encounter Slaton as Slaton was carrying some furnace pipe out the store, and asked Slaton why he was not at work. Slaton explained that he had been ill, but had called in sick to Gollihar. Later back at the shop, Gollihar denied receiving any such call from Slaton and I again find no such call was made.

Slaton testified that he worked on Tuesday, August 11, but based on the testimony of Gollihar, Fernandes, and Office Manager Welk, I find that Slaton didn't work, nor even call in. The same happened on Wednesday, August 12, and on Thursday, August 13, Slaton showed up at the facility only to pick up his tools and turn in his uniforms. Slaton admitted not being at work on Wednesday, August 12, but said his absence was based on a letter received at his home on the evening of August 11, saying he was terminated. Respondent's witnesses denied that such a letter existed and it was never produced. Similarly, Slaton failed to produce any payroll evidence to show he worked on and was paid for Tuesday, August 11.

Respondent presented substantial evidence relating to Slaton's attendance problems, but it is unnecessary to review this evidence, since I find Slaton voluntarily quit his job. On Wednesday, August 12, Gollihar went to Slaton's home to find out what was going on since he hadn't been at work the last 2 days. Slaton told Gollihar it didn't matter if he was fired, because he intended to work as a sheriff's deputy, a job thankfully, Slaton never did get.

At pages 49–52, the General Counsel makes a heroic, but nonetheless vain effort to salvage Slaton's case. Again, I find that Slaton quit his job and the evidence in support of this conclusion is, in my opinion, clear and convincing. See *Cox Fire Protection*, 308 NLRB 793 fn. 2 (1992). For the reasons stated, I will most urgently recommend that the allegation in question be dismissed.[5]

[5] I also find that Mellinger had good cause for telling Slaton he needed a doctor's note to return to work and that this allegation should be dismissed.

3. The alleged 8(a)(1) violations

a. Gollihar as agent of Respondent

The General Counsel contends that Gollihar is an agent for Respondent and cites *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), in support of this claim:

> [A]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. [Citations omitted]. Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." [Citation omitted.]

In the instant case, as in *Zimmerman*, Gollihar was the senior, indeed the only foreman at Respondent's shop. As part of his daily responsibility, Gollihar acted as a conduit for relaying and enforcing Respondent's decisions, directions, policies, and views. See also *Cooper Hand Tools*, 328 NLRB 145 (1999); and *Albertson's Inc.*, 307 NLRB 787 (1992). An employee like Gollihar can be a unit employee and permitted to vote without challenge and yet be an agent of the Employer at the same time. *KAL Contracting Co.*, 284 NRLB 722, 726 fn. 17 (1987).

Under Section 2(13) of the Act, the question whether specific acts performed by an agent were actually authorized or subsequently ratified is not controlling. Indeed, even if the agent's conduct is contrary to an employer's express instruction, the employer will be held responsible for that conduct if employees could reasonably believe that the acts was authorized. *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir. 1971).

I find here that for all times material to this case, Gollihar was an agent of Respondent's in that he acted as a conduit for Respondent's decisions, directions, policies, and views and was perceived by employees to be so acting. The assigning of work to employees and the inspection of that work is a major factor in this finding. Gollihar was perceived by employees to be functioning as foreman, since he was "in charge" of Respondent's facility. In considering the alleged 8(a)(1) violation supposedly committed by Gollihar, I must first determine whether Gollihar's conduct falls within the scope of his apparent authority. See *GM Electric*, 323 NLRB 125, 125–126 (1997). The basis for attributing certain statements of Gollihar to Respondent where appropriate is contained in Federal Rules of Evidence 801(d)(2). (Statements of agents are admissions by party-opponent.) *Firefighters*, 297 NLRB 865 fn. 4 (1990).

At page 26 of his brief, the General Counsel raises an issue based on *Montgomery Ward & Co.,* 115 NLRB 645 (1956). The Respondent did not raise this issue at hearing and hasn't done so in his brief. Based on the case of *Southern Bag Corp.*, 315 NLRB 725 (1994). I find, in agreement with the General Counsel, that *Montgomery Ward* does not apply here. *Southern Bag Corp.*, supra, 725 at fn. 4, the Board distinguished *Montgomery Ward* from cases like the present case by noting that in the former case the Board found that a supervisor who was included in the voting unit had no actual or apparent authority

to act as the employer's agent. Since Gollihar is not alleged to be a supervisor, the case does not apply here.[6]

b. Armed guards and locked gate on election day

On election day, August 20, it is undisputed that Fernandes arranged for two armed guards to be stationed outside Respondent's facility between 12 and 4 p.m. behind locked gates, contrary to the normal practice of open gates. Putting aside the question of why Fernandes' alleged fear for his personal safety first manifested itself some 4 weeks after the alleged threat and then only for about 4 hours during which time employees were voting—I have found above that no such threat was made. I have also found that both Marshall and Piper were unlawfully terminated. In light of these facts, I find that Respondent violated Section 8(a)(1) of the Act by locking the gate to the facility and using the armed guards as indicated—all without good cause.

It is undisputed that Marshall was turned away and not allowed to vote and in light of my findings above, this also violated Section 8(a)(1) of the Act. Although the third amended complaint does not allege that Piper was unlawfully turned away and not allowed to vote, and noting Piper's testimony that he did attempt to vote, but was turned away by the guards, I find as follows: Fernandes testified that if he had been aware of Piper's attempt to enter the facility to vote, he would have instructed the guards to turn him away, based on his prior discharge (Tr. 530). Mellinger testified he observed the front gate most of the time on that afternoon and he kept in touch with the guards via walkie-talkie and was never told that Piper attempted to enter the facility. However, I find that Piper was more credible on this point, and that he did appear and attempt to cast a ballot but was prevented from doing so. Accordingly, both Marshall and Piper were denied the right to cast ballots, which could have been challenged. *Scotch & Sirloin Restaurant*, 269 NLRB 436, 448 (1984).

c. Employee safety meeting

It is alleged that on or about July 14, at a regularly scheduled safety meeting, Fernandes solicited employee grievances and impliedly promised to remedy them and promised to supply all employees in attendance with new electrical cords, fans, and hoses. The evidence shows that these items were discussed and promised at the meeting and delivered to employees soon after. I find that as of July 14 Fernandes was aware of union activity afoot.

The grant of benefits during an election campaign is not per se unlawful where an employer can show that its actions were governed by factors other than the election, for example, past practice. Similarly, the solicitation of grievances with an implied promise to remedy same can be defended by showing a past practice. See *Vestal Nursing Center*, 328 NLRB 87 (1999); *Cooper Hand Tools*, supra, 328 NLRB 145.

Both Fernandes and Gollihar testified that it was established past practice to see what employees needed at the safety meetings and provide it, if possible, depending on budget constraints. I have reviewed Gollihar's minutes of certain meetings (R. Exh. 27) and find from this evidence, a tendency to support Respondent's position. In addition, according to General Counsel witness and current employee Thomas, on cross-examination:

> Q. And it was not uncommon for the company to buy things that were needed in the shop, is that correct?
>
> A. Yes.
>
> Q. Had they brought things in the past that were needed in the shop?
>
> A. We haven't had anything really but too much for the shop on the inside.
>
> Q. But, they had brought cords and fans in the past, haven't they?
>
> A. Yes.
>
> Q. And as needed, correct?
>
> A. Yeah, at the beginning, yes, definitely needed.
>
> Q. When people would wear those out, they would get new ones, isn't that correct?
>
> A. When the time is proper.
>
> [Tr. 201.]

The evidence recited above, plus Fernandes' obsessive concerns for his workman's compensation costs, which caused him to inform himself of any safety-related issues in the shop and correct them when possible, convinces me that what occurred in the safety meeting in issue was consistent with past practice. Accordingly, I will recommend this allegation be dismissed.

d. Respondent's statement regarding retaliation if the Union was chosen

According to current employee Terry Thomas, he and Gollihar were working together in the shop on July 15, just after the lunchbreak and just after Marshall and Jessee had been laid off. Gollihar said that Marshall and Jessee had been laid off because they were a personal threat to the shop and considered to be ringleaders (of the union organizing drive). Gollihar went on to say that Fernandes would close the shop down if necessary, and open it up under a new name or turn it into a tire warehouse (Tr. 186). I note that one of Fernandes' investors owned a number of tire shops in the Stockton area. Gollihar repeated these same comments to Slaton the next day (i.e., that Fernandes would shut the facility down if the Union came in), quoting Fernandes. Gollihar added that Fernandes told him this is "war against the Union." Finally at a union meeting on August 17, the only one Gollihar attended, Gollihar again repeated the substance of these comments: Fernandes said this was war against the Union, that Gollihar had been instructed by Fernandes to get rid of Piper because he was one of the union leaders, and that Marshall and Jessee had been laid off for the same reason, and to intimidate the other workers. Finally, Gollihar quoted Fernandes that he would rather close the place than let it become union. I credit all of General Counsel's witnesses who testified to Gollihar's remarks, Union Organizer Coy, Marshall, and Thomas, a current employee. All these witnesses mutually corroborated each other and present a credible group. As to Gollihar's and Fernandes' denials, I have little difficulty in discrediting this testimony.

[6] Even if Respondent somehow could make a case for the first time in its exceptions that the case of *Montgomery Ward & Co.*, supra, might apply to the conduct of Gollihar, I would still find the violations on the grounds that Fernandes encouraged, authorized, or ratified Gollihar's conduct. *Food Mart Eureka, Inc.*, 323 NLRB 1288 fn. 1 (1997). On the record established in this case, such an inference may be fairly drawn. For example, Jessee credibly testified that after he returned from layoff and his 1-week vacation he talked to Fernandes personally at the shop. Fernandes told him that he wasn't going to let this union beat him, and he would close the doors and turn it into a tire shop before he'd let the shop go union (Tr. 311).

Since Gollihar is a conduit for Fernandes' messages to employees, I find that his statements to employees are binding on Respondent as employees would reasonably consider they were being made to them by Fernandes himself. I find that these statements violate Section 8(a)(1) of the Act. Respondent's threats of shop closure have a particularly coercive threat on employees, and these kinds of threats are more likely than other types of unfair labor practices to affect the election conditions negatively for an extended period of time. *Wallace International de Puerto*, 328 NLRB 29 (1999). In *Wallace*, the Board decided that a long delay in the processing of respondent's exceptions made a bargaining order remedy unadvisable. See also *Weldum International, Inc.*, 321 NLRB 733 (1996), where the Board issued a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (category 2 type bargaining order). In an unpublished order, the Court of Appeals sustained all of the Board's unfair labor practices, but ordered a new election rather than a bargaining order (*NLRB v. Weldum International, Inc.*, 165 F.3d 28 (6th Cir. 1998).[7]

I find that Respondent has failed to present any credible basis for the making of such statements and that they are extremely coercive. I will consider, below, whether by themselves or when considered with other violations if they are sufficient to establish a bargaining order.

e. Inability to grant Jessee a pay raise due to union campaign

About a month after the election was over, Jessee asked Mellinger in writing for a pay raise. Mellinger responded that Respondent couldn't give a pay raise because of the NLRB and the Union. Jessee answered that he worked for Respondent, not the NLRB or the Union.

In his testimony, Mellinger admitted the conversation (Tr. 444–445), and said it was based on a letter from the Union saying Respondent could not change wages or benefits. On cross-examination, Mellinger was shown the letter from the Union demanding negotiation and dated July 15 (published above) (GC Exh. 10). Mellinger replied that was not the letter, "because the letter I read said you could not increase wages or benefits, but I don't see that in here" (Tr. 445). After the General Counsel expressed disbelief that there was a second union letter, Respondent's counsel took over Mellinger on re-direct, and, as if by magic, the first letter became the one that Mellinger had based his statement to Jessee on, and lo and behold, the problem was a simple one of interpretation (Tr. 453). A second letter was never produced and I find there was no second letter to Respondent from the Union. I also find that blaming the Union for refusing to give Jessee a pay raise violates Section 8(a)(1) of the Act. See *Feldkamp Enterprises*, 323 NLRB 1193, 1199 (1997). The idea that Respondent would base its wage policy on what the union had written, when Respondent was competently represented by counsel is ludicrous.

f. Increased monitoring of Thomas and denial of overtime opportunities in retaliation for union support

On or about August 21, the day after the election, Thomas noticed that Fernandes seemed to be watching him closely, a change from the past when Fernandes did not pay him any special attention. Thomas mentioned this to Gollihar, but received no response until the following day when Gollihar confirmed Thomas' suspicions. In fact Gollihar admitted that Fernandes had instructed him to watch Thomas closely and if Gollihar could get anything on Thomas, Gollihar should write him up, as Thomas was a threat to Fernandes. Gollihar also confirmed that Thomas was being punished as a "yes" vote for the Union by having overtime opportunities restricted or eliminated. Fernandes denied this and testified Thomas generally refused overtime opportunities anyway. Gollihar admitted in his testimony that Thomas had mentioned Fernandes close monitoring, but said that he told Thomas to be careful and not give Fernandes any reason to fire him. But Gollihar denied that Fernandes was watching Thomas or that he had told Thomas he was. I credit Thomas on this issue.

I find that by maintaining a close watch over Thomas for union related reasons and by restricting Thomas' overtime opportunities, Respondent violated Section 8(a)(1) of the Act. *Graham Windham Services*, 312 NLRB 1199, 1205 (1993); *Dilling Mechanical Contractors*, 318 NLRB 1140, 1145–1150 (1995). As to Gollihar's telling Thomas he was being denied overtime opportunities. See *Highland Yarn Mills, Inc.*, 313 NLRB 193, 211 (1993).[8]

4. The union's objections

The Union filed timely Objections 1–9, but on November 3, the Union withdrew Objections 1, 4, and 5. The violations of the Act found above support Objection 2 (loss of employment opportunities if employees supported the Union), Objections 6 and 8 (threats to close the facility and/or to take other retaliatory measures if the Union won the election), Objection 7 (acts interfering with, restraining, and/or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act), and Objection 9 (interfered with the conduct of the election) (GC Exh. 1(h)). Objection 3 (promise of benefits to vote against Union and promise of benefits if Union lost election) is overruled. The conduct occurred within the critical period between July 14 and August 20 and I conclude that such conduct constitutes objectionable conduct warranting that the election be set aside. I will not recommend, however, that a second election be conducted because I find that the possibility of erasing the effects of Respondent's unfair labor practices and of assuring a fair rerun election is slight, and that employee majority sentiment once expressed through signing a petition would, on balance, be better protected by a bargaining order.

5. Bargaining order[9]

The General Counsel and, presumably, the Union contend that a *Gissel* category (2) bargaining order should issue. This category includes "less extraordinary cases, with less pervasive misconduct which nevertheless has a 'tendancy' to undermine [the Union's] majority strength and impede the Board's election processes." *NLRB v. Gissel Packing Co.*, supra, 395 U.S.

[7] Many other bargaining orders are enforced by courts based on threats of plant closure and job loss. See, e.g., *Milgo Industrial, Inc.*, 203 NLRB 1196, 1200–1201 (1973), enfd. mem. 497 F.2d 919 (2d Cir. 1974); *Jim Baker Trucking Co.*, 241 NLRB 121, 122 (1979), enfd. mem. 626 F.2d 866 (9th Cir. 1980); and *Precision Graphics*, 256 NLRB 381 (1981), enfd. mem. 681 F.2d 807 (3d Cir. 1982).

[8] Although there is no proof that Thomas did in fact lose overtime opportunities for union-related reasons, it is Gollihar's statement as Respondent's agent that constitutes the gist of the violation and not the truth of the statement.

[9] I note the resemblance of the instant case to *Transportation Repair & Service, Inc.*, 328 NLRB 107 (1999); same type of business, same general facts, same general unfair labor practices, and same bargaining order.

at 613–614. To support my recommendations, I rely on the following factors:

(1) The Union has demonstrated majority support.

(2) The bargaining unit is small—16.[10]

(3) The Union lost the election by a single vote, and unlawfully prevented two union supporters from voting.

(4) Respondent committed "hallmark" violations of the Act, including repeated threats to close the facility. At footnote 7, I have listed a number of cases from the Sixth and Ninth Circuits where the threats standing alone were said to be sufficient to support a bargaining order. To these cases, I add perhaps the leading case from the Sixth Circuit, *Indiana Cal-Pro v. NLRB*, 863 F.2d 1292, 1301–1302 (6th Cir. 1988), where the court stated,

> Courts have repeatedly held that in view of an employee's natural interest in continued employment, threats of plant closure are 'among the most flagrant" of unfair labor practices. See *Gissel*, 395 U.S. at 611 n. 31, 89 S.Ct. at 1938 n. 31; *NLRB v. Naum Bros., Inc.*, 637 F.2d 589, 592 (6th Cir. 1981); *Donn Prods.*, 613 F.2d at 166 ("We recognize that a threat of economic retaliation by closing a plant is one of the most coercive actions which a company can take. . . ."); *Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB*, 705 F.2d 1537, 1542 (11th Cir. 1983) ("[I]t is well established that threats of plant closures by themselves, can justify a *Gissel* order."); *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir.) ("[A] closing is the penultimate threat for an employee, and its psychological effect is at least as likely not to dissipate as other unfair labor practices we have held to justify a *Gissel* . . . order."), cert. denied, 449 U.S. 871, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980); *Amalgamated Clothing Workers of America v. NLRB*, 527 F.2d 803, 807 (D.C. Cir. 1975) ("[A] threat of plant closing is one of the most serious obstacles to fair elections . . . [and] is sufficient to support a bargaining order, as discussed in the *Gissel* case."), cert. denied, 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976); *Chemvet Labs., Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974) (holding threats of plant closure are "the most potent" instruments of employer inference).

(5) Besides the threats in question, Respondent also fired two employees unlawfully and provoked one of the two into a near violent confrontation and committed certain other unfair labor practices which have the effect of eroding the Union's power and authority.

(6) The unlawful campaign against the Union was directed by the highest company officials, Fernandes and Mellinger, an assisted by Respondent's agent and conduit, Gollihar.[11]

(7) Certain unfair labor practices were committed after the election.[12]

(8) Respondent's employees are subject to long-lasting intimidation because the market for their skills and services appears limited. The General Counsel called five current or former bargaining unit employees and Respondent called three, including Gollihar. These men were not shrinking violets or potted plants. They were good sized and conducted themselves boldly. Consider that Slaton and Jessee worked for the company under current or prior management, but returned to Respondent apparently due to the lack of job opportunities in the area. Others who began working under prior management continued with Fernandes even though working conditions grew worse under his stewardship.

For all the reasons stated above, I agree with the General Counsel, brief at 55, traditional Board remedies are unlikely to sufficiently restore "laboratory conditions" (if they ever existed at Respondent). Because a fair rerun election does not appear possible to me, I recommend that a bargaining order issue. See *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB 432 (1999).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by terminating Richard Marshall and Donald Piper and by laying off Donald Jessee.

4. For all times material to this case Respondent's foreman, Philip Gollihar, was and is an agent of Respondent.

5. Respondent violated Section 8(a)(1) of the Act by:

(a) Stationing armed guards in front of the locked front gates on election day.

(b) Making certain statements to employees that adverse employment decisions had been made in retaliation for employee support for the Union and threatening to close the facility if the Union came in.

(c) Blaming the Union for refusing to give an employee a pay raise.

(d) Closely monitoring an employee and telling the same employee that he was being denied overtime opportunities in retaliation for his support for the Union.

6. By the above conducts, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Union's timely Objections 2, 6, 7, 8, and 9 are sustained; and Objection 3 is overruled.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Richard Marshall and Donald Piper, and having discriminatorily laid off Donald Jessee and apparently denied Terry Thomas overtime opportunities, must offer Marshall and Piper reinstatement and make them and Jessee and Thomas whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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[10] In *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1243 (9th Cir. 1980), the court stated that the probable impact of unfair labor practices is increased when a small bargaining unit . . . is involved and increases the need for a bargaining order.

[11] See *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993); and *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1370 (9th Cir. 1981), cert. denied 454 U.S. 835 (1981).

[12] Postelection violations reinforce the need for a bargaining order because they demonstrate the Respondent's intent to continue unlawful practices. See *Long-Airdox Co.*, 277 NLRB 1157, 1160 (1985), and case cited therein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, General Trailers, Inc., Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, denying overtime opportunities, or otherwise discriminating against any employee for supporting International Association of Machinists and Aerospace Workers, Machinists Automotive Trades, District Lodge 190, Local Lodge 2182, AFL–CIO, or any other union.

(b) Stationing armed guards at the facility in front of a locked front gate on election day.

(c) Stating that certain employees had been laid off because they were ringleaders of the Union; that a foreman had been instructed to get rid of an employee because he was a leader of the Union, and threatening that Respondent would close its facility rather than let the Union come in.

(d) Blaming the Union for refusing to give an employee a pay raise.

(e) Closely monitoring an employee and telling the same employee that he was being denied overtime opportunities in retaliation for his support for the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time trailer mechanics, repair persons, welders, painters, parts employees and delivery drivers employed by the Employer at its Stockton, California facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Richard Marshall and Donald Piper full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Richard Marshall, Donald Piper, Donald Jessee, and Terry Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, layoffs and denial of overtime opportunities, and within 3 days thereafter notify Marshall, Piper, Jessee, and Thomas in writing that this has been done and that the discharges, or other discrimination as applicable, will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Stockton, California facility, copies of the attached noticed marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violation of the Act not specifically found.

IT IS FURTHER ORDERED that the Union's Objections 2, 6, 7, 8, and 9 are sustained and the election held August 20, 1998 in Case 32–RC–4486, is set aside, and the petition is dismissed.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objection to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."